

<b>Astarita v Croton Animal Hosp.</b>
2016 NY Slip Op 31731(U)
September 19, 2016
City Court of Peekskill, Westchester County
Docket Number: SC-313-16
Judge: Reginald J. Johnson
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PEEKSKILL CITY COURT  
COUNTY OF WESTCHESTER: STATE OF NEW YORK

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BARBARA ASTARITA,

Plaintiff,

--against--

DECISION & ORDER

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CROTON ANIMAL HOSPITAL and  
BRUCE N. HOSKINS, D.V.M.,

Defendants.

Small Claims Part

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HON. REGINALD J. JOHNSON

This is a Small Claims action commenced pursuant to Uniform City Court Act (UCCA), Article 18. The Plaintiff appeared pro se and produced no witnesses. The Defendants were represented by Connick, Myers, Haas, & McNamee by Barbara Myers, Esq., and produced no witnesses. This matter proceeded to a bench trial.

For the reasons that follow, this matter is decided in accordance herewith.

In deciding this matter, the Court considered, in addition to the testimony of the parties, the following exhibits admitted into evidence at the trial:

1. Plaintiff’s Exhibit “A” consisting of 18 pages of various documents.

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2. Defendant's Exhibit "1" is an Invoice dated 4/22/16 (1 page).
3. Defendant's Exhibit "2" is Pet Vaccine Guarantee (1 page
4. with two sides).

FactsPlaintiff's Direct Testimony

On April 22, 2016, the Plaintiff took her puppy, Wiebka, to the Defendant for first-time vaccinations.<sup>1</sup> The Defendant weighed Wiebka, conducted a new puppy examination, administered DA2PP and Rabies shots, and performed a fecal analysis (Defendant's Exh. "1"). The Defendant emailed the Plaintiff and requested that she return to the animal hospital on May 22, 2016 for the administration of DA2PP (Plaintiff's Exh. "A" at p. 8).<sup>2</sup> The Plaintiff informed the Defendant that she could not return on May 22, 2016, so the Defendant gave the Plaintiff an appointment for May 27, 2016 at which time the Defendant weighed Wiebka and administered DA2P and Parvo vaccines (Plaintiff's Exh. "A" at p. 9). After Wiebka arrived home, she started vomiting during the night and refused to eat or drink.

The following day, May 28, 2016, the Plaintiff informed the Defendant of Wiebka's condition and then brought her to the animal hospital for examination. The Defendant conducted a medical progress

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<sup>1</sup> Wiebka was a 12 weeks and 1 day old, gray and black coated, Schnauzer Mix (Def's Exh. "1").

<sup>2</sup> The Court paginated Plaintiff's Exh. "A" for reference purposes only.

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exam, injected Wiebka with an anti-emetic, and then provided the Plaintiff with dog food (Plaintiff's Exh. "A" at p.10). Several hours after getting home, Wiebka started to vomit the dog food and experience bouts of severe diarrhea.

The following day, Sunday, May 29, 2016, the Plaintiff took Wiebka to the Veterinary Emergency Group in White Plains where she was administered fluids and examined (Plaintiff's Exh. "A" at pp. 11-14). On Monday, May 30, 2016, Plaintiff was informed that Wiebka contracted the parvovirus.<sup>3</sup> On May 31, 2016, the Plaintiff transported Wiebka to the Katonah Bedford Veterinary Center for further treatment (Plaintiff's Exh. "A" at pp. 15-17). Wiebka eventually recovered from the parvovirus. Plaintiff stated the incubation period was 2 to 7 days.

Lastly, Plaintiff testified that the Defendant never informed her about the dangers of the parvovirus; that Wiebka could contract the parvovirus if she did not receive her vaccinations timely; and that the incubation period for the onset of the parvovirus was 2 to 14 days.

### Cross Examination of Plaintiff

On cross examination, the Plaintiff testified that she purchased

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<sup>3</sup>The parvovirus is officially called Canine parvovirus and "is a highly contagious viral disease of dogs that commonly cause acute gastrointestinal illness in puppies. The disease most often strikes in pups between six and 20 weeks old..." See, [http://www.vet.cornell.edu/baker/about/articles/Canine\\_Parvovirus.cfm](http://www.vet.cornell.edu/baker/about/articles/Canine_Parvovirus.cfm) at p. 3. The symptoms of parvo "include lethargy, depression, and loss or lack of appetite, followed by a sudden onset of high fever, vomiting, and diarrhea; the incubation period is 3 to 7 days before the onset of first symptoms. Id. at p. 4.

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Wiebka from a private owner for \$500.00; she conceded that she had no documentation of Wiebka's purchase. Plaintiff also stated that she canceled the scheduled appointment for Wiebka's follow up vaccinations set for May 22, 2016. Plaintiff was shown the Pet Guarantee (Defendant's Exh. "2") from the manufacturer of the anti-parvovirus vaccine administered to Wiebka and asked if that document stated that the manufacturer would consider the vaccination of Wiebka in accordance with the guidelines set forth by the American Animal Hospital Association (AAHA) sufficient. Plaintiff stated that the Pet Guarantee did state that but that the Defendant nevertheless should have followed the guidelines set forth in the instructions of the manufacturer which stated that Wiebka should have been vaccinated no later than 4 weeks from the initial vaccination in order to provide immunity to the parvovirus (Plaintiff's Exh. "A" at p. 3). Plaintiff referred to language in the AAHA which stated that these rules are not intended to represent vaccination standards for all dogs (Plaintiff's Exh. "A" at p. 7). Plaintiff further stated that since Wiebka received her second round of anti-parvovirus more than 4 weeks after the initial vaccination, the Defendant failed to comply with the manufacturer's guidelines thereby causing Wiebka to become susceptible to the parvovirus.

**Direct Testimony of Defendant**

Defendant has been a veterinary for 27 years; he worked at Croton

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Animal Hospital since 1994 and then became the owner in 2000. During the first visit on April 22, 2016, the Defendant advised Plaintiff regarding the care and feeding of Wiebka, vaccine schedules, and the core and non-core vaccines. Defendant stated that Wiebka was vaccinated in accordance with the schedule set forth in the AAHA guidelines, which set forth, among other information, the vaccine and booster interval schedules (Plaintiff's "A" at pp. 2-7). Defendant further stated that the manufacturer of the anti-parvovirus vaccination administered to Wiebka stated that if the administration of the vaccination is done in accordance with the AAHA guidelines, the manufacturer would honor its guarantee and reimburse standard and reasonable diagnostic and treatment costs of the owner of a dog that subsequently contracts the parvovirus. In other words, Defendant was stating that if the manufacturer considered the AAHA guidelines sufficient, then Defendant's compliance with those guidelines should be considered sufficient even though the Defendant did not follow the manufacturer's guidelines.

Defendant stated that the incubation period for parvovirus is 2 to 14 days from the onset of symptoms. Lastly, the Defendant stated if a puppy gets two vaccinations and does not contract parvovirus within 2 weeks after the second vaccination, the puppy is presumed to have developed adequate antibodies to prevent contracting the parvovirus.

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### Cross Examination of Defendant

On cross examination, the Defendant conceded that Wiebka was administered her second round of vaccinations after 16 weeks even though the AAHA guidelines stated that puppies should be vaccinated every 3 to 4 weeks between the ages of 6 and 16 wks.

### Re-Direct Examination of Defendant

The Defendant testified that he followed the vaccine schedule set forth in the AAHA guidelines, that Wiebka's vaccine was administered on the 4/22/16 and 5/27/16, and that the vaccine did not cause Wiebka to contract the parvovirus.

### Closing Arguments

Defendant argued that the Plaintiff failed to prove that he deviated from good and accepted veterinary practice which caused injury to Wiebka. Further, the Defendant argued that the measure of the Plaintiff's damages should be the fair market value of Wiebka or the cost of her treatment whichever is less.

The Plaintiff argued that the Defendant deviated from accepted veterinary practice by adhering to the AAHA guidelines for vaccination administration instead of following the anti-parvovirus directions on label as set forth by the manufacturer.

### Discussion

It has been held that the Small Claims Part of a City Court is

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commanded to “do substantial justice between the parties according to the rules of substantive law.” Williams v Roper, 269 A.D.2d 125, 126, 703 N.Y.S.2d 77, 79 (1<sup>st</sup> Dept. 2000); UCCA §1804; see also, Milsner v. McGahon, 20 Misc.3d 127(A), 2008 WL 2522307 (App. Term. 9<sup>th</sup> & 10<sup>th</sup> Judicial Districts); Basler v. M&S Masonry & Construction, Inc., 21 Misc.3d 137(A), 2008 WL 4916105 (App. Term, 9<sup>th</sup> & 10<sup>th</sup> Judicial Districts). This is especially so since the practice, procedures and forms utilized in the Small Claims Part were meant to “constitute a simple, informal and inexpensive procedure for the prompt determination of such claims in accordance with the rules and principles of substantive law.” UCCA §1802-A. Further, the Court “shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence...” UCCA §1804-A.

In order to establish a prima facie case of veterinary malpractice, the Plaintiff is required to show that the Defendant deviated or departed from accepted veterinary practice, and that such departure was the proximate cause of the injury. See, Solomon v. Center for Specialized Veterinary Care, 13 N.Y.S.3d 853, 2015 N.Y. Misc. LEXIS 924, 2015 NY Slip Op 50423(U) (2d Dept. App Term) [citations omitted]. As a general rule, expert testimony is necessary to establish the applicable standard of care, as well as a deviation from such standard, which

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resulted in injury, unless the case is one within the experience and observation of the average layperson. See, Adesso v. Long Is. Veterinary Specialists, 43 Misc.3d 131(A), 988 N.Y.S.2d 521, 2014 N.Y. Misc. LEXIS 1752, 2014 NY Slip Op 50611(U) (2d Dept. App Term) [citations omitted].

It has been held that expert testimony may be dispensed with in a veterinary malpractice action “where the very nature of the acts complained of bespeaks improper treatment and malpractice.” See, Matthew v. Jerome L Klinger, D.V.M., P.C., 179 Misc.2d 609, 610, 686 N.Y.S.2d 549 [App Term, 9<sup>th</sup> and 10<sup>th</sup> Jud Dists 1998]; see also, Matter of Restrepo v. State of New York, 146 Misc.2d 349, 355, 550 N.Y.S.2d 536 (Ct Cl 1989), affd 179 A.D.2d 804, 580 N.Y.S.2d 874 [1992].

Further, the proper measure of damages for injury to, or the destruction of, an animal is the amount that will compensate the owner for the loss and thus return the owner, monetarily, to the status the owner was in before the loss. See, 3 NY Jur Animals §152. In other words, where the animal has a market value, the owner will be entitled to the market value at the time of the loss or the difference in market value before and after an injury. *Id.* Factors affecting the market value of an animal include the animal’s age, health, and special traits or characteristics of value. See, Zager v. Dimilia, 138 Misc.2d 448, 524 N.Y.S.2d 968 (J. Ct. 1988). It has been held that the cost of veterinary

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treatment is the proper measure of damages for an injured animal. See, Mercurio v. Weber, 2003 N.Y. Misc. LEXIS 801, 2003 NY Slip Op 51036(U) (Dist. Ct. Nassau County 2003) citing Zager v. Dimilia, 138 Misc.2d 448, 524 N.Y.S.2d 968 [J. Ct. 1988].

In the case at bar, the Plaintiff failed to proffer expert testimony to support her claim that the Defendant committed veterinary malpractice by failing to adhere to the vaccination schedule as set forth by the manufacturer on the label of the vaccine, and that said failure was the proximate cause of Wiebka contracting the parvovirus. First, Plaintiff failed to proffer expert testimony that the failure to adhere to the vaccination schedule on the manufacturer's label deviated from accepted veterinary standards of practice. See, Juliano v. S.I. Vet Care, 34 Misc.3d 147(A), 2012 N.Y. Misc. LEXIS 440, 2012 NY Slip Op 50172(U), 950 N.Y.S.2d 492 [2d Dept. App Term]; see also, Harrington v. Berg, 5 Misc.3d 135(A), 799 N.Y.S.2d 160 [2d Dept. App Term], 2004 N.Y. Misc. LEXIS 2422, 2004 NY Slip Op 51488(U).

The evidence at trial established that the manufacturer's Pet Guarantee would honor any claims made by owners whose animals were vaccinated in accordance with the AAHA vaccination schedule and thereafter contracted the parvovirus. Since the manufacturer of the anti-parvovirus that was administered to Wiebka stated that it would honor claims made in accordance with the AAHA vaccination schedule, the

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Court cannot find that the Defendant's deviation from the manufacturer's vaccination schedule on the label of the vaccine in favor of the AAHA vaccination schedule constituted veterinary malpractice. An expert opinion was needed to establish that the deviation was of such a nature and degree as to constitute veterinary malpractice. See, Matthew v. Jerome L Klinger, D.V.M., P.C., 79 Misc.2d at 610.; Solomon v. Center for Specialized Veterinary Care, 13 N.Y.S.3d 853; Adesso v. Long Is. Veterinary Specialists, 43 Misc.3d 131(A).

Further, the conflicting testimony at trial was that the incubation period after infection was 2 to 7 days according to the Plaintiff, or 2 to 14 days according to the Defendant. This factual discrepancy required that Plaintiff proffer expert testimony in order to support her claim that the incubation period for the parvovirus was shorter than the period argued by the Defendant, who is, in fact, a licensed D.V.M.<sup>4</sup> with 27 years of veterinary experience, and that the shorter incubation period was relevant to the issue of Wiebka's contraction of the parvovirus.

Of critical importance in this matter is Plaintiff's testimony that Wiebka became ill the evening of May 27, 2016 after she received her anti-parvovirus vaccination. If this Court were to accept the incubation period argument from either party, then the Court is left to wonder where

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<sup>4</sup>D.V.M. is the acronym for Doctor of Veterinary Medicine.

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or how Wiebka contracted the parvovirus. Specifically, the testimony was that the parvovirus is an infectious disease that could be contracted from an infected animal—perhaps another infected dog, or infected fecal matter. If that is true, then Wiebka could not have contracted the parvovirus from the Defendant because Wiebka contracted the parvovirus well beyond the 2 to 7 or 2 to 14-day window periods since Wiebka’s first visit with the Defendant on April 22, 2016.

It would seem probable that Wiebka was permitted to come into contact with an infected animal, infected fecal matter or an infected environment either 2 to 7 days or 2 to 14 days prior to the second visit with the Defendant on May 27, 2016. In any event, Plaintiff needed an expert who could give an expert opinion to a reasonable degree of medical certainty as whether the Defendant’s failure to vaccinate Wiebka with the anti-parvovirus within 3 to 4 weeks of the first vaccinations was the proximate cause of Wiebka’s contraction of the parvovirus. Solomon v. Center for Specialized Veterinary Care, 13 N.Y.S.3d 853. The Court is left to speculate as to whether Wiebka contracted the parvovirus because she was not vaccinated within 3 to 4 weeks of her initial vaccinations; or because, as the Defendant argued, Wiebka would not have developed immunity to the parvovirus until 2 weeks after the administration of the anti-parvovirus vaccine to her on May 27, 2016.

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“A judicial award, even one issued in the context of a small claims action, must rest upon competent evidence, and not mere inference or surmise.” Rollock v. Modell, Inc., 169 Misc.2d 663, 665, 652 N.Y.S.2d 465, 467 (App. Term, 1<sup>st</sup> Dept. 1996).

Based on the aforesaid and accordance with the principles of substantial justice, the Court finds that the Plaintiff failed to prove the Defendant committed veterinary malpractice by a fair preponderance of the credible evidence.

Ordered, that the Complaint is dismissed.

This constitutes the decision and order of the Court.

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Hon. Reginald J. Johnson  
Peekskill City Court Judge

DATED: Peekskill, New York  
September 19, 2016

Judgment entered in accordance with the foregoing this \_\_\_\_ day of  
\_\_\_\_\_ 2016

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Concetta Cardinale  
Chief Clerk